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FEB 22 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	2 CA-CR 2010-0387
Appellee,)	2 CA-CR 2010-0388
)	(Consolidated)
v.)	DEPARTMENT B
)	
MICHAEL ALLEN HAWKINS,)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
Appellant.)	Rule 111, Rules of
)	the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause Nos. CR200800685 and CR200900848

Honorable James L. Conlogue, Judge
Honorable Donna Beumler, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann

Tucson
Attorneys for Appellee

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By Bethany Graham

Bisbee
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E S P I N O S A, Judge.

¶1 Following a consolidated jury trial, Michael Hawkins was convicted of six felonies and one misdemeanor.¹ The trial court sentenced him to concurrent and consecutive prison terms totaling eleven years. On appeal, Hawkins contends the court erred in granting the state’s motion to amend the indictment as to two counts of aggravated assault, instead of granting Hawkins’s motion for judgment of acquittal on those charges. He also argues the court abused its discretion by not excluding other-acts evidence. Finally, Hawkins contests the court’s denial of his post-trial motion to vacate judgment based upon newly discovered evidence. For the reasons set forth below, we affirm Hawkins’s convictions and sentences.

Factual Background and Procedural History

¶2 We view the facts in the light most favorable to sustaining the jury’s verdicts. *State v. Bearup*, 221 Ariz. 163, ¶ 16, 211 P.3d 684, 688 (2009). Hawkins lived with the victim, C.K., from fall 2007 until C.K. ended the relationship in August 2008 and began seeing another man. In late August 2008, Hawkins telephoned C.K. to “try[] to keep [the] relationship together.” C.K. could hear the sound of a pistol “clicking” in the background as he asked her “what a week of [her] life was worth” and “what ten days of [her] life was worth.” Hawkins told C.K. “[h]e was going to blow his head off because he couldn’t live without [her],” and he needed “closure.” She agreed to meet him at eight

¹In case number CR200800685, Hawkins was convicted on counts 4 and 5 for aggravated assault with a deadly weapon, both dangerous class three felonies; count 6 for threatening and intimidating, a class one misdemeanor; and count 7 for endangerment, a dangerous class six felony. In case number CR200900848, Hawkins was found guilty on count 1 for aggravated harassment, a class six felony; count 4 for influencing a witness, a class five felony; and count 5 for threatening or intimidating, a class six felony. The state proved Hawkins committed the last two offenses while on release.

o'clock the next morning. That night, C.K. wrote a farewell letter to her family and friends.

¶3 The next morning, Hawkins drove C.K. to the base of a nearby mountain “to talk.” The couple had sexual intercourse,² after which Hawkins took C.K. home to shower and change; the two later went to a restaurant, and then to a park. At the park, Hawkins attempted to have intercourse with C.K. again, but she refused. While driving back to C.K.’s house, Hawkins produced a pistol, cocked it, and pointed it at his temple and then at C.K.’s head. She testified she had a “white blackout” from fear. Hawkins moved the gun to five or six inches from C.K.’s face and fired the gun through the open window. He then threw the gun out of the truck and told C.K. “not to say anything to anybody, otherwise [she] would regret it.” Hawkins later told his mother he had fired the gun in front of C.K.’s face and he could “burn down [C.K.’s family’s] house,” “mak[ing] it look like an accident.”

¶4 Two days later, Hawkins went to C.K.’s home, and when she answered her front door, threatened to commit suicide. C.K. obtained an order of protection against him later that day. Between August 26 and September 8, 2008, sheriff deputies unsuccessfully attempted to serve Hawkins with the order of protection. On September 7, Hawkins and his daughter came to C.K.’s house at night, and she called the sheriff.

²C.K. alleged that Hawkins had raped her and the charges against him included counts of sexual assault, sexual abuse, and kidnapping, for which the jury acquitted him.

¶5 The following day, Hawkins’s mother called 9-1-1, worried he was going to commit suicide or hurt someone. She reported he had a gun, carried a razor blade, had red marks on his wrists, had been drinking, and had stated he wished C.K.’s family was dead. Deputies responded and attempted to contact Hawkins but were unable to approach him as he had “barricaded” himself in his house. He reportedly threatened to commit suicide or to shoot and kill anyone who approached. Meanwhile, a deputy recorded statements from Hawkins’s mother, pastor, and brother about Hawkins’s previous threats and involvement with C.K. After an hour, police and medical responders decided to leave the scene rather than risk exacerbating the situation.

¶6 On September 10, Hawkins was arrested, and deputies served the restraining order and executed a search warrant at his residence, finding a shotgun and bullets. Hawkins had previously retrieved his pistol and turned it over to his mother, who gave it to police. During his pretrial release, Hawkins followed and contacted C.K. on multiple occasions, in violation of the restraining order. Hawkins eventually was convicted and sentenced as described above. We have jurisdiction over this appeal pursuant to Ariz. Const. art. II, § 24; A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033.

Discussion

Amendment of Indictment on Aggravated-Assault Charges

¶7 During C.K.’s testimony, the trial court suggested that the indictment be amended so that instead of charging aggravated assault under A.R.S. § 13-1203(A)(1) (“[i]ntentionally, knowingly or recklessly causing any physical injury to another person”), it would charge Hawkins with a violation of § 13-1203(A)(2) (“[i]ntentionally

placing another person in reasonable apprehension of imminent physical injury”), noting the state was proceeding under the (A)(2) non-injury theory, while the indictment reflected the (A)(1) theory, which requires some injury to the victim.³ The state acknowledged some confusion as to the charges, and Hawkins’s counsel confirmed the indictment specified subsection (A)(1), physical injury. The court asked “if there was going to be an issue” with amending the charges and cited *State v. Freeney*, recognizing possible prejudice to Hawkins if the indictment were amended. 223 Ariz. 110, 219 P.3d 1039 (2009). Hawkins’s counsel immediately stated he intended to move for a judgment of acquittal under Rule 20, Ariz. R. Crim. P., because no evidence of physical injury had been presented. In response, the prosecutor confessed she had not been aware the indictment charged Hawkins under (A)(1) instead of (A)(2), pointed out the disclosure to Hawkins reflected the victim’s apprehension of imminent harm, and moved to amend. *See* Ariz. R. Crim. P. 13.5(b). The court granted the state’s motion over Hawkins’s objection, finding the indictment was only technically defective and the “substance of the charge” invoked subsection (A)(2). Hawkins twice moved for a judgment of acquittal on the amended indictment, and the court denied both motions.

³The unamended counts read, “On or about the 22nd day of August, 2008, Michael Allen Hawkins, committed domestic violence by committing aggravated assault against, [C.K.] using a deadly weapon or dangerous instrument, to wit: pointed a handgun at [C.K.]’s head, in violation of A.R.S. §§ . . . 13-1203(A)(1), 13-1204(A)(2)(B)” and “On or about the 22nd day of August, 2008, Michael Allen Hawkins, committed domestic violence by committing aggravated assault against, [C.K.] using a deadly weapon or dangerous instrument, to wit: by firing a handgun in front of her face, in violation of A.R.S. §§ . . . 13-1203(A)(1), 13-1204(A)(2)(B).”

¶8 Charges in a grand jury indictment “may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment. The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding.” Ariz. R. Crim. P. 13.5(b). “A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way.” *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980). An amendment that alters the elements of the charged offense and does not serve to correct a mistake of fact or remedy a formal or technical defect in the indictment is not authorized under Rule 13.5(b). *Freeney*, 223 Ariz. 110, ¶¶ 16-20, 219 P.3d at 1042. A trial court’s grant of a motion to amend the indictment mid-trial is reviewed for harmless error. *State v. Lehr*, 227 Ariz. 140, ¶¶ 67-69, 254 P.3d 379, 393, *cert. denied*, ___ U.S. ___, 132 S. Ct. 403 (2011).

¶9 Citing *State v. Johnson*, 198 Ariz. 245, ¶ 10, 8 P.3d 1159, 1162 (App. 2000) and *Freeney*, 223 Ariz. 110, ¶ 20, 219 P.3d at 1042,⁴ Hawkins argues the trial court violated Rule 13.5(b) in granting the state’s motion because the amendment changed the nature of the offense and prejudiced him by undermining his planned defense and denying him adequate notice to allow him to develop a new theory of the case. The state concedes the statutory subsections present different theories of culpability, the amendment operated to change the nature of the offenses charged, and the indictment was

⁴Hawkins also cites *State v. Sanders*, 205 Ariz. 208, ¶¶ 33, 50, 68 P.3d 434, 442-43, 446 (App. 2003), for the proposition that an amendment to an indictment that violates Rule 13.5 is prejudicial per se. However, the *Sanders* holding has been abrogated by *Freeney*, 223 Ariz. 110, ¶ 26, 219 P.3d at 1043, which held a defendant must demonstrate actual prejudice resulting from the amendment.

amended in violation of Rule 13.5(b). *See Freeney*, 223 Ariz. 110, ¶ 17, 219 P.3d at 1042. We agree that the amendment was not authorized under Rule 13.5(b), because it changed the nature of the offense when the original indictment was not defective: it simply had charged Hawkins with an offense the state was unable to prove. *See Freeney*, 223 Ariz. 110, ¶¶ 19-20, 219 P.3d at 1042. However, a violation of Rule 13.5 does not automatically require reversal if the state can establish the error was harmless beyond a reasonable doubt. *Lehr*, 227 Ariz. 140, ¶¶ 67, 69, 254 P.3d at 393; *Freeney*, 223 Ariz. 110, ¶ 26, 219 P.3d at 1043.

¶10 Hawkins contends the amendment prejudiced him by hindering his defense against the charges and rendering moot the testimony of his expert witness. The state counters that the error was harmless because Hawkins was on notice the state was proceeding on the “reasonable apprehension of imminent physical injury” theory at trial, based on the evidence presented at the grand jury hearing, which had been disclosed to Hawkins in advance of trial, and because the indictment’s factual descriptions underlying both aggravated-assault charges did not refer to any physical injury, but stated only that Hawkins committed aggravated assault by “point[ing] a handgun at [C.K.]’s head” and “firing a handgun in front of her face.”

¶11 The state has met its burden of demonstrating harmless error in this case. Hawkins’s counsel’s opening statement made clear his defense was that the gun was never fired and that C.K. was not raped or harmed. During trial Hawkins pointed to the lack of any evidence of torn clothing, DNA, or hospital reports. The evidence that C.K. was uninjured and the vehicle was undamaged remained relevant to Hawkins’s claim that

the gun was never fired and was consistent with his defense to a charge under either statutory subsection. And Hawkins was not surprised by the charge that C.K. was assaulted when he fired a gun close to her face, because that allegation was reflected in the description of the facts within the indictment. *See Freeney*, 223 Ariz. 110, ¶¶ 27-28, 219 P.3d at 1043-44 (harmless error where defendant on notice of allegation); *State v. Noriega*, 142 Ariz. 474, 482-83, 690 P.2d 775, 783-84 (1984) (no prejudice where, following conviction, erroneous statutory subsection amended and defendant previously on notice of prosecutor's intent to seek enhanced penalties), *overruled on other grounds by State v. Burge*, 167 Ariz. 25, 804 P.2d 754 (1990), and *State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010).

¶12 As noted above, no evidence of injury was presented to the grand jury. And *Johnson* is distinguishable because in that case the amendment of the facts within the indictment following the victim's testimony substantially undercut the defendant's opportunity to cross-examine the victim on her inconsistent statements. 198 Ariz. 245, ¶¶ 10, 12, 8 P.3d at 1162-63. Here, prior to the amendment, Hawkins already was proceeding under the defense theory that C.K. was lying about the gun being fired, and the amendment did not require any change to this strategy. Although he argues "the amendment greatly impaired [his] ability to prove that theory to the jury," he offers no explanation why. Accordingly, we see no prejudice to Hawkins and conclude the error was harmless. *See State v. Dungan*, 149 Ariz. 357, 362, 718 P.2d 1010, 1015 (App. 1985).

¶13 Hawkins also contends the amendment of the indictment violated his Sixth Amendment right to notice of the nature of the charges, maintains he was actually prejudiced thereby,⁵ and attempts to distinguish his case from *Freeney*, 223 Ariz. 110, ¶ 29, 219 P.3d at 1044. The Sixth Amendment affords a criminal defendant the right “to be informed of the nature and cause of the accusation.” A defendant must be given actual notice of the charge, whether from an indictment or another source. *Id.* Although the Sixth Amendment is violated when there is insufficient notice of the charges and the defendant is prejudiced by a new or amended charge, a violation of Rule 13.5(b) does not necessarily equate to an infringement of Sixth Amendment rights. *Id.* ¶¶ 25, 29.

¶14 The same factors demonstrating that the Rule 13.5(b) violation was harmless support the conclusion that Hawkins’s Sixth Amendment rights were not violated. *See Lehr*, 227 Ariz. 140, ¶ 70, 254 P.3d at 393. And, that Hawkins was subjected to a charge “different from that alleged before the amendment” is not material to the determination of prejudice; rather we consider “whether the amendment somehow prejudices the defendant’s ‘litigation strategy, trial preparation, examination of witnesses, or argument.’” *Id.*, quoting *Freeney*, 223 Ariz. 110, ¶ 28, 219 P.3d at 1044. We agree with the state that the amendment did not affect Hawkins’s stated defense at trial that there was no evidence he had fired the gun at all. *Johnson*, 198 Ariz. 245, ¶ 13, 8 P.3d at 1163.⁶ Furthermore, in addition to the notice outlined above, Hawkins received actual

⁵The trial court acknowledged “if the amendment was incorrect [then] eventually those counts would have to be dismissed” pursuant to Rule 20.

⁶The state also asserts that until the court raised the issue, Hawkins’s counsel believed the indictment alleged violations of subsection (A)(2). Hawkins points out in

notice of the state’s intention to convict him under the non-injury theory on the third day of the trial and eight days before closing arguments. *See Stephens v. Borg*, 59 F.3d 932, 934-36 (9th Cir. 1995) (lack of felony-murder charge did not violate Sixth Amendment notice requirement when defendant “had five days of actual notice [before closing arguments] of the prosecution’s intention to rely on a felony-murder theory”); *United States v. Odom*, 252 F.3d 1289, 1298 (11th Cir. 2001) (“Even an inadequate indictment satisfies due process if the defendant has actual notice, so that she suffers no prejudice.”); *cf. Sheppard v. Rees*, 909 F.2d 1234, 1237 (9th Cir. 1989) (Sixth Amendment violated where prosecutor “ambushed” defense with new theory of culpability after both sides rested and after jury instructions were settled). Thus, we conclude Hawkins had sufficient notice of the charges against him and his Sixth Amendment rights therefore were not violated.

¶15 Hawkins next argues “the trial court exhibited [the] appearance of impropriety” when it suggested the state file a motion to amend the indictment and asserts the court committed fundamental error by giving “tactical legal advice” to the state. *See State v. Hurley*, 197 Ariz. 400, ¶¶ 20, 24-25, 4 P.3d 455, 459-60 (App. 2000). The allegation of a biased trial judge is subject to structural-error review and does not require Hawkins to have raised the issue below. *See State v. Valverde*, 220 Ariz. 582, ¶ 10 & n.2, 208 P.3d 233, 235-36 & n.2 (2009); *State v. Ring*, 204 Ariz. 534, ¶ 46, 65

response that his proposed jury instruction for aggravated assault demonstrates his belief that the state was proceeding under the (A)(1) definition, requiring the state to prove physical injury. But the record indicates both parties’ counsel conflated the charges when the court brought the issue to their attention during trial.

P.3d 915, 933-34 (2003). Structural error is error which ““deprive[s] defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence,”” and if found, requires reversal, as prejudice is presumed. *Valverde*, 220 Ariz. 582, ¶ 10, 208 P.3d at 235-36, *quoting Ring*, 204 Ariz. 534, ¶ 45, 65 P.3d at 933 (alteration in *Valverde*); *see also Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

¶16 ““A trial judge is presumed to be free of bias and prejudice.”” *State v. Ramsey*, 211 Ariz. 529, ¶ 38, 124 P.3d 756, 768 (App. 2005), *quoting Hurley*, 197 Ariz. 400, ¶ 24, 4 P.3d at 459. Judicial bias or prejudice must ““arise from an extra-judicial source and not from what the judge has done in his participation in the case.”” *State v. Emanuel*, 159 Ariz. 464, 469, 768 P.2d 196, 201 (App. 1989), *quoting State v. Thompson*, 150 Ariz. 554, 557, 724 P.2d 1223, 1227 (App. 1986); *see also Ramsey*, 211 Ariz. 529, ¶ 38, 124 P.3d at 768 (““[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.””), *quoting State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997), *quoting Liteky v. United States*, 510 U.S. 540, 541 (1994) (alteration in *Henry*). Moreover, a trial court’s suggestion to a party pertaining to trial proceedings does not necessarily reflect bias. *See Hurley*, 197 Ariz. 400, ¶¶ 18-25, 4 P.3d at 459-60. Hawkins has cited no extra-judicial source of the alleged judicial bias and we find no evidence of such in the record. And before regarding an error as structural, we must find actual error. *See Tumey*, 273 U.S. at 535 (actual bias

warranted reversal); *see also Ring*, 204 Ariz. 534, ¶ 46, 65 P.3d at 934 (to regard error as structural, error must infect entire trial process from beginning to end). Here we find no error, much less structural error.

Denial of Rule 20 Motion for Judgment of Acquittal

¶17 Hawkins next asserts the trial court erred by denying his Rule 20 motion for judgment of acquittal on the aggravated-assault charges because there was no substantial evidence of physical injury. “The court shall enter a judgment of acquittal of one or more offenses charged in an indictment . . . after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction.” Ariz. R. Crim. P. 20(a). Evidence is substantial when reasonable jurors could accept the evidence as sufficient to support a guilty verdict beyond a reasonable doubt, *Ramsey*, 211 Ariz. 529, ¶ 40, 124 P.3d at 769, as tested against a statute’s required elements, *see State v. Pena*, 209 Ariz. 503, ¶ 8, 104 P.3d 873, 875 (App. 2005).

¶18 Although Hawkins indicated to the court before the state rested that he would make a Rule 20 motion, the court could consider such a motion only at the close of the state’s case. *See* Ariz. R. Crim. P. 20. Therefore, Hawkins’s motions were directed toward the amended aggravated-assault charges, which did not require evidence of injury. *See* § 13-1203(A)(2). We have upheld the amendment of the charges, and injury to the victim was not an element of the amended offense. There was sufficient evidence to

support Hawkins's conviction of a violation of § 13-1203(A)(2); therefore, the trial court did not err in denying Hawkins's Rule 20 motions.⁷

Exclusion of Other-Acts Evidence

¶19 Hawkins next argues the trial court abused its discretion by admitting evidence of the September 8, 2008, incident in which Hawkins barricaded himself in his home and threatened to kill anyone who entered. *See* Ariz. R. Evid. 404(b). Hawkins asserts the court improperly admitted this evidence of other acts without finding that (1) the state proved by clear and convincing evidence he had committed the prior act, (2) the state offered the evidence for a proper purpose, and (3) the probative value of the evidence was not outweighed by the danger of unfair prejudice. *See State v. Vigil*, 195 Ariz. 189, ¶ 14, 986 P.2d 222, 224 (App. 1999), *citing State v. Terrazas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997), *and State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997).

¶20 The state argues the evidence was properly admitted to show Hawkins's motive, intent, and plan in stalking, harassing, and threatening C.K., and asserts that the court's lack of express findings does not require reversal, citing *State v. Vega*, 228 Ariz. 24, ¶ 19, 262 P.3d 628, 633 (App. 2011), and *State v. Marshall*, 197 Ariz. 496, ¶¶ 6-7, 4 P.3d 1039, 1042 (App. 2000). The state maintains the trial court weighed the potential for undue prejudice and urges this court to accept its implicit finding, citing *State v. Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998).

⁷For the same reason we decline to consider Hawkins's requests that his conviction for endangerment be reversed and vacated as arising out of the same incident as the aggravated-assault charges.

¶21 We review the trial court’s ruling on a motion to exclude evidence for an abuse of discretion. *Lehr*, 227 Ariz. 140, ¶ 19, 254 P.3d at 386. Under Rule 404(b), Ariz. R. Evid., evidence of other crimes, wrongs, or acts may be admissible to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” But evidence of such acts may not be admitted to show a defendant acted in conformity with a character trait. *State v. Watkins*, 126 Ariz. 293, 299, 614 P.2d 835, 841 (1980). Even when Rule 404(b) evidence is improperly admitted, a reviewing court may determine the error was harmless. *Id.*

¶22 At the motion in limine hearing on the admissibility of the September 8 incident, the court heard testimony and reviewed the recording of statements by Hawkins’s mother, brother, and pastor that Hawkins was threatening suicide, refusing service on an order of protection, and had been using alcohol and possibly other drugs. The court precluded statements about Hawkins’s “past violent behavior,” past drug use, and unrelated orders of protection sought by previous girlfriends, and admitted the remainder of the recording as non-hearsay or admissible hearsay. *See* Ariz. R. Evid. 801, 803(1), (2).

¶23 The trial court found that the evidence was offered for a proper purpose: “Hawkins’[s] level of emotional involvement in this relationship, and the degree to which he may have been distraught during th[e] timeframe [pertinent to the charges against him] is relevant to show his motive, his intent, his plan, all admissible [Rule 404(b)] factors.” The court also weighed the probative value of the evidence against the danger of unfair prejudice, finding that although the testimony was “very inflammatory” and “very

damaging” to Hawkins’s case, the evidence was “not unduly prejudicial.” *See* Ariz. R. Evid. 403. The court offered to give the jury a limiting instruction, recognizing the potential prejudice to Hawkins from admitting the evidence.

¶24 The trial court additionally found the redacted recording provided “some” evidence of the event and of Hawkins’s relationship with C.K., and was made by a deputy contemporaneously with the event. Although the court did not expressly find the state had met the clear-and-convincing standard required for admission of the other-act evidence, *see Vigil*, 195 Ariz. 189, ¶ 16, 986 P.2d at 225, it heard testimony of the witnesses and made a finding of admissibility under Rule 404(b), which necessarily implied a finding that the prior-acts evidence was clear and convincing, *see Vega*, 228 Ariz. 24, ¶ 19, 262 P.3d at 633. Finally, the recording was sufficient proof that Hawkins had committed the prior acts. *See Marshall*, 197 Ariz. 496, ¶ 6, 4 P.3d at 1042 (*Terrazas* clear-and-convincing requirement satisfied without express finding where evidence included witness testimony and video recording of crime); *see also Terrazas*, 189 Ariz. at 582, 944 P.2d at 1196 (clear-and-convincing standard requires “substantial evidence sufficient to take the case to a jury”), *quoting State v. Hughes*, 102 Ariz. 118, 123, 426 P.2d 386, 391 (1967). We find no abuse of discretion in the court’s admission of the redacted recording and events of September 8.

Newly Discovered Evidence

¶25 Two months after his trial, Hawkins filed a motion to vacate judgment alleging newly discovered evidence based on the clerk of court having released a cellular telephone record of the victim covering the time period of the crimes. *See* Ariz. R.

Crim. P. 24.2(a)(2), 32.1(e). The trial court denied the motion, finding the newly discovered material would not have changed the verdict. On appeal, Hawkins asserts the victim's telephone records pertaining to the time period of August 23, 2008, through September 8, 2008, constituted newly discovered evidence, and the trial court abused its discretion in denying his motion to vacate the judgment. *See* Ariz. R. Crim. P. 32.1. The court's decision is reviewed for an abuse of discretion. *State v. Orantez*, 183 Ariz. 218, 221, 902 P.2d 824, 827 (1995).

¶26 Hawkins previously had caused subpoenas to issue for three of C.K.'s telephone numbers, and those records reflected no call details for August 23, 2008, through September 8, 2008. Although Hawkins had informed his counsel that C.K. had a fourth telephone number and the number could have been detected from both Hawkins's and his mother's telephone records, Hawkins's counsel did not subpoena the records for the fourth number until two weeks before trial. The records arrived at the court during the trial on September 27, 2010, but Hawkins was not informed of their arrival by the clerk until October 14, 2010.

¶27 To warrant the vacation of a judgment, (1) "newly discovered material facts" must have been "discovered after the trial," (2) the defendant must have "exercised due diligence" in securing those facts, and (3) the facts must not be "merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence." Ariz. R. Crim. P. 24.2(a)(2), 32.1(e). Hawkins's counsel acknowledged he had been "neglectful" in overlooking the

fourth number, noting it was contained in Hawkins's and his mother's telephone records. Hawkins thus was aware of the existence of the records well in advance of trial and failed to exercise due diligence to obtain them. *Cf. State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000) ("Evidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence."). Therefore, the records were not newly discovered evidence. Accordingly, we see no abuse of discretion in the trial court's ruling. *See State v. Dugan*, 113 Ariz. 354, 356, 555 P.2d 108, 110 (1976) (on appeal, trial court's ruling affirmed "on any grounds which were within the issues").

¶28 Moreover, even had the telephone records been produced during trial, Hawkins's explanation for how they would have changed the outcome is unconvincing. In addition to speculating about further impeachment of C.K. and other witnesses, Hawkins asserts had he known of the multiple telephone calls to C.K.'s mother and boyfriend on the day of the assault, he could have elicited testimony from them as to C.K.'s calm demeanor that day, which could have changed the verdicts. However, evidence was presented at trial that C.K. was not in distress on the day of the assault: she went to a restaurant with Hawkins after he reportedly had sexually assaulted her, showed up to work on time, went on a date with her boyfriend that night, did not tell anyone about the assault with the gun at the time, and, in fact, failed to report it until two weeks later. We cannot say the trial court abused its discretion in finding that evidence of the

calls would have been merely cumulative. *See State v. Bilke*, 162 Ariz. 51, 52-53, 781 P.2d 28, 30-31 (1989).

Disposition

¶29 For the reasons set forth above, Hawkins's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge